IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-753

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA, *Petitioner*,

v.

JOHN DANIEL, *Respondent*.

No. 77-754

LOCAL 705, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA, AND
LOUIS F. PEICK, *Petitioners*,

v.

JOHN DANIEL, *Respondent*.

**On Writ of Certiorari to
the United States Court of Appeals for the Seventh Circuit**

MOTION OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Pursuant to Rule 42(3) of the Rules of this Court, the National Coordinating Committee for Multiemployer Plans ("NCCMP") respectfully moves for leave to file the accompanying brief as *amicus curiae*. Petitioners have consented to the filing of this brief; respondent has not.

INTEREST OF THE NCCMP

Multiemployer plans were formed in construction and other transient trades or industries where workers are generally employed too briefly by any one employer to earn benefits in that employer's plan. Such plans are created and funded pursuant to collective bargaining agreements and receive contributions from more than one employer. The NCCMP is a nonprofit, tax-exempt organization, formed after enactment of the Employee Retirement Income Security Act of 1974 ("ERISA") to participate in the development of government regulations under ERISA and other laws affecting multiemployer plans. Fifty trade unions and multiemployer pension plans (but not the particular unions or plans involved in this case) are affiliated with the NCCMP, and its plans are fairly representative of all the nation's multiemployer plans, covering in the aggregate 7.5 million employees. While the decision below has far-reaching consequences for pension plans generally, the consequences are particularly adverse for multiemployer plans, for the reasons set forth in the accompanying brief.

The NCCMP urges reversal of the judgment below, but in no way approves of unduly restrictive continuity-of-service provisions. Such provisions are not common in multiemployer plans. The NCCMP's concern is

that affirmance of the ruling below—that an employee covered by a negotiated, noncontributory, involuntary, defined-benefit pension plan "purchases securities" by commencing and continuing employment—would have far-reaching, adverse consequences upon its pension plans.

FACTS AND QUESTIONS OF LAW DEVELOPED BY THE NCCMP

The NCCMP brief focuses on issues which it believes may not be adequately presented elsewhere, including: (a) the particularly adverse impact that the court's holding below would have on collectively-bargained multiemployer plans; and (b) the fundamental differences between coverage under a negotiated, noncontributory, involuntary, defined-benefit pension plan and interests which this Court has characterized as "securities" within the meaning of the securities laws.

The NCCMP therefore moves for leave to file the accompanying brief as *amicus curiae*.

Respectfully submitted,

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BRIEF OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

The National Coordinating Committee for Multiemployer Plans ("NCCMP") submits this brief as *amicus curiae* to urge this Court to reverse the holding below [1] that a worker covered by the typical collectively-bargained defined-benefit pension plan is a "purchaser" of a "security" within the meaning of the securities laws.

I. INTEREST OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

The nature and purpose of the NCCMP is set forth in the accompanying motion for leave to file this brief. As set forth *infra*, pp. 27-32, the NCCMP submits that the decision below will have particularly significant adverse effect upon multiemployer plans. The NCCMP is concerned that affirmance of the lower court's ruling may cause the termination of many multiemployer plans, which are more difficult to create than single-employer plans. The lower court's ruling would in effect retroactively expand the number of workers eligible for pension benefits. It would also greatly increase the plans' administrative and litigation costs by adding securities laws exposure to the extensive existing requirements administered by the Departments of Labor and the Treasury.[2] All additional

[1] *Daniel* v. *International Brotherhood of Teamsters*, 561 F.2d 1223 (7th Cir. 1977), App. 209a.

[2] The dual administration of ERISA (by the Departments of Labor and the Treasury) has already been a source of conflict and confusion, resulting, inter alia, in legislative proposals to divide jurisdiction into discrete areas, or to put all administrative responsibility into a single government agency. *See, e.g.*, S. 901, 95th Cong., 1st Sess. (1977); H.R. 4340, 95th Cong., 1st Sess. (1977), *summarized*, Pens. Plan Guide (CCH) ¶ 23,268 (1977). Treble administration (including the Securities and Exchange Commission) can only exacerbate an already difficult situation.

costs must ultimately be borne by workers covered by multiemployer plans and inevitably will cause a reduction in accruals of future benefits, or even a curtailment of coverage.

II. THE NATURE OF MULTIEMPLOYER PLANS

Multiemployer plans were originally developed in industries in which job changes are frequent and there is little continuity in the employer-employee relationship. For example, employees in the construction industry are generally hired for a specific project, and their employment terminates when the job is finished. In other industries, competitive conditions, business failures, or recurring layoffs prevent the establishment of a stable employer-employee relationship. In such situations, a multiemployer plan—which provides an employee with credit for service with a number of employers—may be the only vehicle for providing meaningful pension rights.

The multiemployer plan involved in this proceeding, and the typical plan affiliated with the NCCMP, have the following common characteristics: (i) they are established and maintained pursuant to the collective bargaining process; (ii) they are involuntary in that there is no individual choice whether to participate—all employees subject to the relevant provisions of the collective bargaining agreement are covered (within the limits of the plan's eligibility requirements) in the plan; (iii) they are noncontributory in that the employers make all payments to the plan; and (iv) they provide a "defined benefit" in that an employee who meets the plan's eligibility and vesting requirements is entitled at retirement only to a specific monthly benefit in a fixed amount.

A financially sound plan requires a proper actuarial relationship between employer contributions and em-

ployee benefits. Although contributions of employers in defined-benefit plans most often vary with the time worked or the units produced by covered employees, contributions are not made for the accounts of particular employees. No employee has any legal title or interest in the employer's contributions to a defined-benefit plan, or (apart from his possible pension eligibility under the rules of the plan) in the assets of the plan itself.[3] Indeed, the defined benefit levels supportable by a given level of contributions are invariably based on the actuarial assumption that some number of workers ultimately will die, move, or transfer to other industries and thus will never qualify for pension benefits, and that benefits will be paid only to employees with a long-term relationship with employers served by the multiemployer plan.

III. SUMMARY OF REASONS FOR REVERSAL

1. Coverage under a negotiated, noncontributory, involuntary, defined-benefit pension plan does not involve the "issuance of a security" within the meaning of the securities acts as consistently interpreted by this Court. The lower court erred in holding that such coverage involves an "investment contract." Under *SEC* v. *W.J. Howey Co.*, 328 U.S. 293 (1946), and *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837 (1975), the concept of an "investment contract" for the purposes of the securities laws contemplates an inducement to investors to participate in the capital markets. These pension plans established by collective-bargaining agreements contain no such inducement.

[3] *See* Article 13 of the Amended Trust Agreement (as amended) of the Local 705 Pension Fund Trust Agreement, App. 64a.

Moreover, like ordinary annuities and unlike securities, the benefits received under these pension plans are defined in advance and do not vary with the success of any investment program. Economic reality compels the conclusion that a worker who takes a job requiring coverage under a defined-benefit pension plan is not thereby "investing" in a "security."

2. A balancing of public policy considerations is required before the courts extend the judicially-implied private right of action under Rule 10b-5. The applicable public policy considerations here point strongly to the conclusion that the extension of such right by the lower court was inappropriate. Allowing employees to sue pension plans under the securities laws would (a) lead to particularly vexatious litigation, the outcome of which would turn on hazy issues of historical fact, often capable of proof only by oral testimony; (b) produce results inconsistent with the careful balancing of competing equities which Congress struck in enacting ERISA; and (c) create exposure so large as to threaten destruction of many pension plans, particularly multiemployer plans, and in any event to defeat the legitimate expectations of millions of workers.

IV. REASONS FOR REVERSAL

The lower court reached out to apply the federal securities laws in an attempt to correct what it perceived to be an egregious wrong committed against Mr. Daniel.[4] The court did not stop to consider whether the unprecedented result it reached was really necessary, i.e., whether there were remedies under com-

[4] The restrictive continuity-of-service requirements applied to Mr. Daniel are not commonly found in other multiemployer plans.

mon law[5] and federal labor law[6] as Mr. Daniel claimed. In ruling that he was entitled to sue under the antifraud provisions of the securities laws, the court exposed all pension plans to damage suits for breach of duties of disclosure under the securities acts—duties no one ever supposed they had. The court's decision confirms the ancient wisdom that "hard cases make bad law," *Northern Securities Co.* v. *United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

A. There was no "investment contract"

The lower court improperly held that this case involved the "purchase" of a "security" within the meaning of the Securities Act of 1933 and the Securities Exchange Act of 1934. The term "security" is defined in the 1933 Act to mean

[5] For example, the New York Court of Appeals recently applied principles of contract and trust law to ensure grant of a pension to a worker who, because of a one-year break-in-service, was denied benefits after 28 years of service. *Mitzner* v. *Jarcho*, No. 76 (N.Y. Feb. 22, 1978).

[6] Plaintiff pleaded alleged facts and claimed entitlement to relief under two separate provisions of the labor laws: (1) section 302(c)(5) of the Taft-Hartley Act, 29 U.S.C. § 186(c)(5), which requires that pension funds be established for the "sole and exclusive benefit of the employees," *see, e.g., Lugo* v. *Employees Retirement Fund*, 366 F. Supp. 99, 102 (E.D.N.Y. 1973) ([a] plaintiff who places in issue the exclusionary eligibility requirements of a trust fund places in issue the question whether the fund is a section 302 trust fund"), *aff'd*, 529 F.2d 251 (2d Cir.), *cert. denied*, 429 U.S. 826 (1976); and (2) the duty of fair representation required of unions by section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a), *see, e.g., Vaca* v. *Sipes*, 386 U.S. 171, 177 (1967).

> "any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a 'security,' or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing." 15 U.S.C. § 77b(1).[7]

Coverage under pension plans of the type involved in this case—collectively bargained, noncontributory, involuntary, with defined benefits—is not a "security" in any conventional sense. The court below held, however, that such coverage constitutes an "investment

[7] The definition of security in the 1934 Act is similar:

> "The term 'security' means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a 'security'; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited." 15 U.S.C. § 78c(10).

contract." That term is not defined in the securities acts, but *SEC* v. *W. J. Howey Co.*, 328 U.S. 293, 298-99 (1946), held that "an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party."

We shall show that coverage under a plan such as that at issue here lacks essential elements of the *Howey* test: the worker makes neither an investment decision nor an investment, and the worker does not participate in the plan in expectation of profits.

1. There was no investment decision.

In a noncontributory, involuntary pension plan, the worker makes no investment. The employer makes the contributions, as required by the collective bargaining agreement.[8] The court below nevertheless concluded that the employees were purchasers of securities on the theory that the employer's contribution was constructively made by the employees. 561 F.2d at 1231-33, App. 222a-25a. Even under this analysis, however, there is no investment.

The court's reasoning ignores the teaching of this Court that economic realities must be considered in applying the *Howey* test. As stated in *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 849 (1975):

> "The primary purpose of the Acts of 1933 and 1934 was to eliminate serious abuses in a largely unregulated securities market. The focus of the Acts is on the capital market of the enterprise system: the sale of securities to raise capital for profit-making purposes, the exchanges on which securities are traded, and the need for regulation to prevent fraud and to protect the interest of investors. Because securities transactions are economic in character Congress intended the application of these statutes to turn on the economic realities underlying a transaction, and not on the name appended thereto."

[8] Most multiemployer plans share with the plan described in *Connolly* v. *PBGC*, No. 76-2777, slip op. at 4 (9th Cir. May 4, 1978), the feature that "[p]ension credits are earned even if the employer fails to contribute the full amount of his obligation." This is further evidence that no individual employee makes an investment.

As a matter of economic reality, a worker whose terms of employment are established in labor-management negotiations does not act in any respect as an "investor" when he accepts or continues employment. The fact that the terms of his employment require that he be covered by a noncontributory pension plan, does not make him an investor in the "capital market." While the worker has legally protected interests—under common law, federal labor law and the Employee Retirement Income Security Act of 1974, 88 Stat. 829 ("ERISA")—these interests are not the interests of "investors."

In cases in which the Court has held a financial interest to be an investment contract—and therefore a security—as a matter of economic reality the person acquiring the interest made an investment decision. *See, e.g., SEC* v. *C. M. Joiner Leasing Corp.*, 320 U.S. 344, 348-49 (1943); *SEC* v. *W. J. Howey Co.*, 328 U.S. 293, 298-300 (1946); *Tcherepnin* v. *Knight*, 389 U.S. 332, 336 (1967). In each of these cases it was critical that there was a scheme to induce persons to invest in the particular enterprise involved as opposed to other recognized methods of participating in the capital markets—for example, by purchasing stocks, bonds or mutual fund shares. Indeed, in each instance the interest sold as an investment contract was *advertised and sold*

as an investment. In *Joiner*, for example, the Court held that in determining whether an investment is a security one must consider

> "what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect. In the enforcement of an act such as this [the 1933 Act], it is not inappropriate that promoters' offerings be judged as being what they were represented to be." 320 U.S. at 352-53.

Similarly, in *Howey*, the Court noted that the sellers were

> "offering an opportunity to contribute money and to share in the profits of a large citrus fruit enterprise managed and partly owned by respondents. They are offering this opportunity to persons who reside in distant localities and who lack the equipment and experience requisite to the cultivation, harvesting and marketing of the citrus products. Such persons have no desire to occupy the land or to develop it themselves; *they are attracted solely by the prospects of a return on their investment*." 328 U.S. at 299-300 (emphasis added).

See also Tcherepnin v. *Knight*, *supra*, 389 U.S. at 338-39; *SEC* v. *United Benefit Life Insurance Co.*, 387 U.S. 202, 211 (1967).

The essential facts here bear no resemblance to those in which investment decisions have been found: jobs are not advertised as opportunities to invest in the capital market;[9] the union negotiates all job-related

[9] Booklets or other materials describing pension plans can hardly be considered "promoters' offerings." The individual does not customarily even receive such materials before or at the time that he decides to accept employment covered by the plan, and that practice was endorsed in ERISA.

issues, including terms of the pension plan. The employee has no choice but to be covered by the plan if he accepts employment.

2. There was no expectation of profit

When an individual acquires an investment contract, he subjects his capital to risk in the hope of receiving dividends, interest, or appreciation. An employee who is covered by a noncontributory, defined-benefit pension plan, however, has no capital at risk and no expectation of dividends, interest, or appreciation. His only expectation is receipt of the defined benefits provided under the plan if he meets the eligibility requirements. To be sure, the plan's assets will be invested by the trustees of the plan. However, the benefits an individual employee may ultimately receive do not depend upon the results achieved. Even if the plan's investment program were unusually successful, the recipient would not be entitled to increased benefits. If, on the other hand, the investment program were not successful, the employee would still be entitled to the same defined benefits.[10]

The Seventh Circuit nonetheless reasoned that an employee covered by a pension plan has an expectation of "profits" in that (a) the plan's assets are invested, and (b) the pension benefits received by the employee could exceed the amount which his employer contributed by reason of his employment. 561 F.2d at 1231-34, App. 226a-28a. These factors are not "profits" in the sense this Court has deemed relevant in determining whether financial interests are

[10] ERISA requires that contributions meet funding standards which have the objective of ultimately funding the defined benefits, and benefits may be guaranteed by the Pension Benefit Guaranty Corporation. See Title IV of ERISA.

securities. *SEC* v. *Variable Annuity Life Insurance Co. of America (VALIC)*, 359 U.S. 65 (1959); *SEC* v. *United Benefit Life Insurance Co.*, 387 U.S. 202 (1967). Under these cases, the decisive factor in applying the *Howey* test is whether the benefit to be received varies with the success of the plan's investment program. The analysis in these cases points strongly to the conclusion that coverage under a defined-benefit pension plan is not a "security."

The issue in *VALIC* and *United Benefit Life* was whether variable annuities are "securities" even though ordinary annuities are not.[11]

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[11] Ordinary annuities are expressly exempted from registration by section 3 (a) (8) of the 1933 Act, 15 U.S.C. § 77c(a)(8). Congress declared that its intention was merely to

> "[make] clear what is already implied in the act, namely, that insurance policies are not to be regarded as securities subject to the provisions of the act. The insurance policy *and like contracts* are not regarded in the commercial world as securities offered to the public for investment purposes. The entire tenor of the act would lead, *even without the specific exemption*, to the exclusion of insurance policies from the provisions of the act, but the specific exemption is included to make misinterpretation impossible." H.R. Rep. No. 85, 73d Cong., 1st Sess. 15 (1933) (emphasis added), *cited in VALIC*, 359 U.S. at 74 n. 4 (Brennan & Stewart, JJ., concurring).

Furthermore, the "[Securities and Exchange] Commission has taken the position that insurance or endowment policies or annuity contracts issued by regularly constituted insurance companies were not intended to be securities, and that in effect § 3(a) (8) is supererogation." 1. L. Loss, *Securities Regulation* 497 (2d ed. 1961) (footnote omitted).

The Court has specifically agreed with Professor Loss' conclusion that section 3(a) (8) was superfluous. *Tcherepnin* v. *Knight, supra*, 389 U.S. at 342 n. 30:

> "Congress specifically stated that 'insurance policies are not to be regarded as securities subject to the provisions

Under an ordinary annuity contract an individual makes payment to the issuing company, in a lump sum or on a periodic basis, in return for which the issuing company typically promises to make periodic payments during the individual's retirement years. As in the case of defined-benefit pension plans, the payments received by the individual are at a fixed level defined in advance in accordance with actuarial assumptions, including an assumed rate of return on the annuity company's investments. The total amount that the individual will ultimately receive depends on how long he lives. In contrast, variable annuities—which, unlike defined-benefit pension plans, permit the periodic payments received by the individual to depend on investment results—have been held to be securities.

In explaining why it was rational for Congress to subject variable annuities to regulation under the securities laws while leaving ordinary annuities to regulation by state insurance authorities, the concurring justices in *VALIC* stated that:

> "This congressional division of regulatory functions is rational and purposeful in the case of a traditional life insurance or annuity policy, *where the obligations of the company were measured in fixed-dollar terms and where the investor could not be said, in any meaningful sense, to be a sharer in the investment experience of the company.* In fact, one of the basic premises of state

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> of the act,' [citation omitted], and the exemption from registration for insurance policies was clearly supererogation."

Therefore, ordinary annuity contracts are not "securities" for purposes of federal securities regulation. To the extent that defined-benefit pension plans are in economic reality "like contracts," they too are not "securities."

regulation would appear to be that in one sense the investor in an annuity or life insurance company *not* become a direct sharer in the company's investment experience; that his investment in the policy or contract be sufficiently protected to prevent this." 359 U.S. at 77-78 (Brennan & Stewart, JJ., concurring) (emphasis added).

The *VALIC* Court stated:

> "While all the States regulate 'annuities' under their 'insurance' laws, traditionally and customarily they have been fixed annuities, offering the annuitant specified and definite amounts beginning with a certain year of his or her life. The standards for investment of funds underlying these annuities have been conservative. The variable annuity introduced two new features. First, premiums collected are invested to a greater degree in common stocks and other equities. Second, benefit payments vary with the success of the investment policy. . . ." 359 U.S. at 69.

The Court held in *VALIC* that a variable annuity is a security because the benefits received vary with investment performance, not because of actuarial risk that as a result of early death the annuitant will receive little or no benefit. The Court said:

> "Moreover, actuarially both the fixed-dollar annuity and the variable annuity are calculated by identical principles. Each issuer assumes the risk of mortality from the moment the contract is issued. . . . It is this feature, common to both, that respondents stress when they urge that this is basically an insurance device.
>
> "The difficulty is that, absent some guarantee of fixed income, the variable annuity places all the investment risks on the annuitant, none on the company. The holder gets only a *pro rata* share of what the portfolio of equity interests reflects—which may be a lot, a little, or nothing." 359 U.S. at 70-71 (footnotes omitted).[12]

Nothing, therefore, more clearly dramatizes the error of the court below than the fact that the disclosure required by the court was not related to market performance but only to the actuarial risk of nonvesting.

Moreover, even if, *arguendo*, a defined-benefit plan could be said to include some element of "profit," it would not follow that there is a "security" within the meaning of the securities laws, because in economic reality any profit would be an incidental aspect of the entire "transaction." The Court so held in *Forman*, in determining that shares of stock in a housing cooperative were not "securities." In that case it was conceded that the housing cooperative could earn income from commercial leases that would result in reduction of the rental payments to be paid by the tenant-shareholders. The Court said:

> "The short of the matter is that the stores and services in question were established not as a means of returning profits to tenants, but for the purpose of making essential services available for the residents of this enormous complex. By statute these facilities can only be 'incidental and appurtenant' to the housing project. [Citation omitted.] Undoubtedly they make Co-op City a more attractive housing opportunity, but the possibility of some rental reduction is not an 'expec-

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[12] The annuity involved in *United Benefit Life* was similarly held to be a security because the benefits which the annuitant would receive upon retirement were not defined in advance, but instead were variable, depending directly and importantly on the success of the annuity company's investment activities. *See* 387 U.S. at 210-11.

tation of profit' in the sense found necessary in *Howey*." 421 U.S. at 856-57 (footnotes omitted).

Economic reality compels the conclusion that a worker who takes a job which provides coverage under a defined-benefit pension plan is not thereby "investing" in a "security."

B. Public policy militates against extending private rights of action under the securities laws

Even accepting the lower court's conclusion that an employee "purchases" a "security" simply by taking a job, it does not follow that he may sue under Rule 10b-5.[13]

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[13] Section 10(b) of the 1934 Act provides:

> "It shall be unlawful for any person directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> "(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule 10b-5 provides:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> (1) to employ any device, scheme, or artifice to defraud,
>
> (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

The private right of action under Rule 10b-5 is a creature of the judiciary, not of Congress.[14] This Court said in *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 477 (1977):

> "Congress did not expressly provide a private cause of action for violations of § 10(b). Although we have recognized an implied cause of action under that section in some circumstances, *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, [404 U.S.] at 13 n.9, we have also recognized that a private cause of action under the antifraud provisions of the Securities Exchange Act should not be implied where it is 'unnecessary to ensure the fulfillment of Congress' purposes' in adopting the Act. *Piper* v. *Chris-Craft Industries, Inc.*, [430 U.S.] at 41. *Cf. J.I. Case Co.* v. *Borak*, 377 U.S. 426, 431-433 (1964)."

Extension of the private right of action under Rule 10b-5 to new classes of claimants therefore turns on (i) whether such extension is necessary to fulfill Congress' purposes in passing the securities acts; and (ii) a judicial balancing of the "policy considerations" involved, *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 737, 749 (1975). Extension of a private right of action under the federal securities laws, is not neces-

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> (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person
>
> in connection with the purchase or sale of any security."

Plaintiff in the court below also alleged a cause of action under section 17(a) of the 1933 Act which similarly does not by its terms provide for a private right of action.

[14] As this Court has made clear, federal courts should not automatically imply private rights of action under statutes that specify violations but provide no express private remedies. *Cort* v. *Ash*, 422 U.S. 66 (1975).

sary in this case. As discussed above, *supra* pp. 8-9, 6, Congress' purpose in enacting the federal securities laws was to regulate the capital markets, not non-contributory, defined-benefit pension plans; and, Mr. Daniel claimed relief under both common law and labor laws. As we now show, extension of a private right of action is unwise as a matter of policy, since it would have substantial adverse effects upon pension plans and would be inconsistent with ERISA.

1. Extension of private rights of action would lead to vexatious litigation

The Court stated in *Blue Chip* that Rule 10b-5 litigation presents a significant "danger of vexatiousness different in degree and in kind than that which accompanies litigation in general" and noted "the possibility 'that unduly expansive imposition of civil liability will lead to large judgments payable in the last analysis by innocent investors for the benefit of speculators and their lawyers,'" 421 U.S. at 739, quoting Judge Friendly's concurring opinion in *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 867 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969), 404 U.S. 1005 (1971).

Here, there is no less a likelihood that large lawsuits would be commenced against collectively-bargained pension plans. Millions of workers have suddenly been transformed into holders of "securities" of pension plans, some of whom, like Mr. Daniel, "purchased" those "securities" over 20 years ago. The circumstances under which these "securities" were "sold" to persons who may now lay claim to disappointed pension expectations will make such persons and the plans which covered them fair game for class action specialists. It is the plan participants and beneficiaries, however, who must ultimately bear the costs

of that litigation, since pension plans exist solely for their benefit.

The specific "disclosure" required by the holding of the lower court—"the actuarial probability . . . that a member actually will receive pension benefits"—is itself likely to be challenged as misleading.[15] A study recently commissioned by the Department of Labor[16] on the potential effect of the lower court holding (hereinafter "Department of Labor Study") concluded that

> "any statement provided to a participant about his individual probability of receiving a pension and probably be [*sic*] false and misleading, since it is virtually impossible to provide accurate information on this subject." [17]

The likelihood that a given employee will receive pension benefits not only turns on such factors as the vitality of the industry (especially in the case of multiemployer plans) and the health of the individual employee, but also depends in large measure upon whether that employee chooses to remain employed in the industry or go elsewhere. Thus, while actuarial assump-

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[15] *See* F. Cummings, *The Daniel Case—Disclosure or Mandatory Oddmaking*, Pension World, November 1977, at 37. Mr. Cummings describes the party making the disclosure required by the Seventh Circuit as "a new kind of oddsmaker—a 'vesting bookie' . . . ." *Id.*

[16] Grubbs, Report to the Secretary of Labor—Potential Effects of *Daniel* (March 20, 1978) (hereinafter "DOL Study").

[17] DOL Study at I-5. Moreover, it is far from clear what actuarial assumptions should be made. Unanswered questions include whether the probability should be based on assumptions derived from the experience of all participants, or that of different subgroups based on categories such as age, sex, job classification, etc.; whether the probability is that of achieving 100 percent or some lesser degree of vesting; and whether the probability is only for new entrants into the plan or for existing participants as well. DOL Study at IV-5.

tions concerning "turnover" of employees may be useful in calculating the future liabilities of a pension plan and the contribution rate necessary to fund such liabilities, individual "turnover" is subject to a number of factors, some of which are solely within the knowledge and control of the individual employee. Aggregate actuarial data will thus be misleading rather than informative with respect to the probability that an individual employee will remain in the plan long enough to qualify for a benefit. Under the lower court's decision, however, a person who failed to meet the eligibility requirements of virtually any pension plan in the country could demonstrate a failure to disclose this "actuarial probability" and seek relief under Rule 10b-5.[18]

[18] The SEC suggested in its *amicus* brief to the court below (pp. 5, 58) that pension plans will be affected by the decision below only if they engaged in actual fraud. It is true that *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976), established that a defendant did not violate Rule 10b-5 unless he acted with "scienter," a "mental state embracing intent to deceive, manipulate, or defraud," *id.* at 193 n.12. In its pretrial brief in *SEC* v. *National Student Marketing Corp.*, Civ. Action No. 225-72 (D.D.C.), dated December 6, 1976, however, the SEC contended that even in private damage cases under *Hochfelder*, "'scienter' may be proven without evidence of specific intent to deceive but by evidence of 'gross negligence' or other knowing conduct." SEC Brief at 165. Citing *Herzfeld* v. *Laventhol, Krekstein, Horwath & Horwath*, 540 F.2d 27 (2d Cir. 1976); *Bailey* v. *Meister Brau, Inc.*, 535 F.2d 982 (7th Cir. 1976); and *McLean* v. *Alexander*, 420 F. Supp. 1057 (D. Del. 1976), the SEC contended that this modified negligence standard has been the lower courts' response to the *Hochfelder* definition of the culpability necessary to establish a violation of Rule 10b-5. SEC Brief at 165. *See also, e.g., Franke* v. *Midwestern Oklahoma Development Authority*, 428 F. Supp. 719, 725 (D. Okla. 1976). Furthermore, the SEC contends that it need not prove scienter at all in injunctive actions.

Furthermore, extension of a private right of action under Rule 10b-5 to the pension plan context would not be limited to failures to disclose the actuarial probability of receiving a benefit. Even assuming, *arguendo*, that meaningful disclosure of actuarial probability can be readily made, the disclosure issues that could be presented in litigation are many. Any alleged failure to disclose or any misstatement concerning size and timing of benefits, investment policies or any other matter that bears on the value of the worker's "investment" might provide grist for the Rule 10b-5 class action mill. If the potential employee is truly making an investment decision to purchase a "security," presumably the "issuer" of that security would be required to disclose to him adequate information concerning the investment policies of the pension plan, its financial soundness, the financial soundness of employers having a contractual obligation to contribute to the plan and similar matters. Insofar as we are aware, no noncontributory pension plan has made such disclosure to potential beneficiaries.[19]

This Court also noted in *Blue Chip* that extending the private right of action under Rule 10b-5 to defrauded offerees of securities would confront courts and juries with "many rather hazy issues of historical

SEC Brief at 164-65. Yet an injunction might include rescissionary and collateral relief in the nature of money damages, *see, e.g., SEC* v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301 (2d Cir.), *cert. denied*, 404 U.S. 1005 (1971).

[19] It is noteworthy that in *SEC* v. *Shenker*, Civ. Action No. 77-1787 (D.D.C. 1977), the SEC further expanded its view of the application of the antifraud provisions to employee benefit plans, by moving from the concept of disclosure about terms and conditions of participation in a plan to the investment policies and fiduciary conduct of plan officials—welfare plan officials as well as those of a pension plan.

fact, the proof of which [would] depend almost entirely on oral testimony." 421 U.S. at 743. The nature of this proof, the Court indicated, might subject defendants to a kind of legalized blackmail, forcing settlements even in groundless cases. Such dangers are equally apparent here. Retroactive application of a "failure to disclose" rule (back to 1955 in Mr. Daniel's case [20]) necessarily involves "hazy issues of historical fact," the resolution of which depends on oral testimony as to what the worker was told when first employed. Indeed, the lower court's conclusion that a "sale" was involved relies, in part, on Mr. Daniel's affidavit

> "that he would not have worked for a Local 705 covered employer if he had been advised about the continuous nature of the 20-year requirement before receiving a pension." 561 F.2d at 1243, App. 245a.

The court also found that

> "[w]hen an employee decides to retain his job his decision results in his continuing to give value in the future in his further acquisition of interests in the pension fund." *Id.*

Proof that these actions involved "investment decisions" will almost always depend on the claimant's oral testimony concerning his state of mind years ago. As this Court said with respect to similar "state of mind" proof in *Blue Chip*:

> "Plaintiff's proof would not be that he purchased or sold stock, a fact which would be capable of documentary verification in most situations, but instead that he decided *not* to purchase or sell stock. Plaintiff's entire testimony could be dependent upon uncorroborated oral evidence of his claim, and still be sufficient to go to the jury. The jury would not even have the benefit of weighing the plaintiff's version against the defendant's version, since the elements to which the plaintiff would testify would be in many cases totally unknown and unknowable to the defendant. The very real risk in permitting those in respondent's position to sue under Rule 10b-5 is that the door will be open to recovery of substantial damages on the part of one who offers only his own testimony to prove that he ever consulted a prospectus of the issuer, that he paid any attention to it, or that the representations contained in it damaged him." 421 U.S. at 746 (footnote omitted).

[20] *See* 561 F.2d at 1227, App. 212a.

2. Extension of private rights of action would destroy the balance Congress struck in ERISA between remedying past inequities as to some workers and reduction of future benefits to others

ERISA was enacted after a thorough investigation and study of problems in the pension plan area.[21] Congress considered the extent to which it should provide retroactive relief to persons who had failed to meet harsh eligibility requirements in the past. It was mindful, however, that correction of inequities would involve charges to be borne by the plans, and therefore had to be balanced against the inequity of defeating the legitimate pension expectations of other workers. The compromises incorporated in ERISA now threaten to be vitiated by Rule 10b-5 suits which in effect

[21] As the Ninth Circuit stated in a recent opinion, "ERISA is the product of several years of legislative effort to improve the American pension system . . . a complex piece of legislation which addresses itself to many problems." *Connolly* v. *PBGC*, No. 76-2777, slip op. at 5 (May 4, 1978).

seek the very retroactive relief that Congress determined should not be granted.

The balancing of competing equities which Congress fashioned is illustrated by the exceptions Congress provided to the general rule that all service with the participating employer, whether before or after the enactment of ERISA, must be credited for vesting purposes. For example, service prior to January 1, 1970 need not be counted unless an employee has at least three years of service after December 31, 1970.[22] A plan may also disregard service before the effective date of ERISA if such service would otherwise have been disregarded under the rules of the plan with regard to breaks in service.[23]

These exceptions were deliberately enacted "[t]o keep the operation of the minimum vesting requirement reasonable and to avoid imposing undue burdens on plans. . . ."[24] With respect to workers such as Mr. Daniel, Congress' determination to balance the competing interests involved is set forth in unmistakable terms:

> "[I]t does not appear to be desirable to provide for retroactive vesting for employees who have already terminated their service with the employer, since this would create a substantial unexpected cost for the plan (thereby possibly jeopardizing the size of benefits for employees still covered under the plan). . . ."[25]

[22] ERISA § 203 (b) (1) (E); I.R.C. § 411(a) (4) (E). The cited provisions do not permit disregard of service which the pre-ERISA plan terms required be counted.

[23] ERISA § 203(b) (1) (F); I.R.C. § 411(a) (4) (F).

[24] House Ways and Means Committee Report on H.R. 12855, H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 20 (1974). *See also* House Ways and Means Committee Report on H.R. 12481, H.R. Rep. No. 93-779, 93d Cong., 2d Sess. 20 (1974); 120 Cong. Rec. 4297 (1974) (remarks of Mr. Ullman).

Allowing private suits under Rule 10b-5 would thus upset the balance which Congress so carefully struck in ERISA. Furthermore, that balance in ERISA proceeds from Congress' understanding that the securities laws were inapplicable (*see* Teamsters International Petition at 33-41), an understanding which is now "part of the arch on which the new structure rests," *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 349 (1963). This is another sound policy reason why the Court should reject the lower court's extension of private rights of action.

3. Extension of private rights of action would require disclosure inconsistent with the type of disclosure which Congress, in passing ERISA, deemed appropriate

The ERISA disclosure requirements[26] are a direct response to testimony by one worker after another that he had been unaware of the provisions and rules of his plan. Even when plan documents and explanatory materials had been provided, they were generally in-

[25] House Ways and Means Committee Report on H.R. 12481, H.R. Rep. No. 93-779, 93d Cong., 2d Sess. 56 (1974); House Ways and Means Committee Report on H.R. 12855, H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 57 (1974). *See also* 120 Cong. Rec. 19199 (1974) (remarks of Mr. Ullman).

[26] ERISA sections 101 through 110 and 1031 through 1034 detail the disclosure and reporting required of pension plans. In some cases, this disclosure takes place directly to plan participants, in other cases, to the Department of Labor or the Treasury Department. For the most part, however, those reports made to government agencies rather than plan participants are themselves public information. ERISA § 106(a). Lengthy disclosure and reporting regulations have been promulgated by the Labor Department. *See* 29 C.F.R. § 2520.102-1 *et seq.* and § 2520.103-1 *et seq.*

comprehensible to plan participants. As one worker testified:

> "You see, all of these pensions are done up by corporation lawyers and against people, say working people with a high school education, and as everybody knows, there's no competition." [27]

Another worker said:

> "Senator, I have here books on the pension plan that ain't worth a quarter because I can't understand it. I don't know anything about it, and I defy any trustee of our plan to explain this to me. . . ." [28]

Congress therefore required that the document summarizing and describing the plan "be written in a manner calculated to be understood by the average plan participant. . . ." ERISA § 102(a)(1). It would require an amazing feat of draftsmanship, however, to make disclosures which would comply with ERISA section 102(a)(1) and yet suffice to avoid Rule 10b-5 liability—particularly in the case of complex actuarial assumptions. As corporate counsel are well aware, assurance against liability under Rule 10b-5 requires disclosure of all information which might reasonably be deemed "material" in light of this Court's opinion in *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976).[29] The complex and detailed disclosure that

[27] *See* 120 Cong. Rec. 29934 (1974) (remarks of Sen. Williams).

[28] *See id.*

[29] There are no definitive guidelines in the antifraud area of the securities laws. Rule 10b-5 itself is written in broad, general terms. The SEC has not utilized rulemaking power to clarify its requirements, *cf. SEC* v. *Chenery Corp.*, 332 U.S. 194, 215 (1947) (Jackson, J., dissenting) (Holding Company Act), but has instead relied on case-by-case adjudication, where courts have interpreted the requirements of the rule

would be required under the decision below is the very type of disclosure that workers complained about,[30] and that Congress was determined to prevent in ERISA.

4. Affirmance of the decision below would threaten the stability and cause termination of many multiemployer plans

In the circumstances set forth above, administrators and employers are understandably concerned over their plans' potential liability. Indeed, the NCCMP has been advised that some employers and plan administrators, concerned over the implications of the decision below, have already declined to approve new bene-

"flexibly," *e.g.*, *Lanza* v. *Drexel & Co.*, 479 F.2d 1277, 1299 (2d Cir. 1973), "broadly," *e.g.*, *Garner* v. *Pearson*, 374 F. Supp. 591, 595 (M.D. Fla. 1974), and "liberally," *e.g.*, *Fox* v. *Kane-Miller Corp.*, 398 F. Supp. 609, 637 (D. Md. 1975), *aff'd*, 542 F.2d 915 (4th Cir. 1976). The establishment of definitive guidelines is contrary to the policy of the SEC. In responding to a request from Senators Williams and Javits as to what disclosure the SEC believed is required of pension plans under the lower court's decision, the Chairman of the SEC responded, *inter alia*: "[T]he efficacy of the antifraud provisions would be sacrificed if hard and fast rules were laid down as to what those provisions required. . . ." Memorandum submitted under cover letter of December 7, 1977 to Honorable Harrison A. Williams, Chairman, Committee on Human Resources, United States Senate, by Harold M. Williams, Chairman, SEC.

[30] Even the more sophisticated investor in the traditional securities markets may find such disclosure too complex or lengthy to understand. However, there are analysts and investment counselors to whom such documents are understandable and meaningful. One who purchases securities on a broker's recommendation or on the advice of an investment analyst may well have benefited from such disclosure. There are no parties analogous to analysts and investment counselors in the pension plan context.

fits or increases in existing benefits.[31] Furthermore, concerns about potential liability and additional costs and regulation brought about by the applicability of the securities law[32] are likely to result in a significant curtailment in the provision of pension benefits,[33] which neither ERISA nor any other federal law requires employers to provide.

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[31] In one case currently being litigated, a contributing employer contends that the plan's alleged failure to make the disclosures required by the decision below vitiates his obligations under the collective bargaining agreement and entitles him to a refund of all contributions previously made. *Western Washington Laborers-Employers Health & Security Trust Fund* v. *Universal Utility Contractors, Inc.*, Civ. No. C77-710M (W.D. Wash).

[32] There is no basis for the finding of the court below that interests in pension plans are "securities" for antifraud purposes but are not subject to the registration provisions of the securities laws. It is axiomatic that the registration provisions are applicable to all securities absent a statutory exemption. At the most, the legislative and administrative history discussed by the Seventh Circuit, 561 F.2d at 1237-1241, App. 258a-59a suggests an exemption from the registration provisions only for the "securities" of pension plans whose funds are maintained by a bank or in a separate account by an insurance company. The assets of multiemployer plans—such as the members of the NCCMP—are generally *not* managed by banks or insurance companies, with the result that their "securities" would be subject to the full panoply of registration requirements of the securities laws.

[33] According to a Pension Benefit Guaranty Corporation ("PBGC") study, "Analysis of Single Employer Defined Benefit Plan Terminations, 1976," PBGC Publication No. 505, approximately ten percent of the plans covered by Title IV of ERISA (relating to plan termination insurance and contingent employer liability) terminated in the two calendar years following its enactment. *Id.* at 2. Of those plans terminating in 1976, 20 percent cited ERISA as the reason for termination, and another 15 percent cited ERISA as one of several

The Department of Labor Study discussed above, *supra* p. 19, concluded that the potential exposure of pension plans under the lower court's holding may approach $40 billion.[34] This Court recognized recently in *City of Los Angeles* v. *Manhart*, 46 U.S.L.W. 4347, 4352 (U.S. 1978), that significant changes in rules governing pension plans which create major unforeseen contingencies should not lightly be adopted:

> "Nor can we ignore the potential impact which changes in rules affecting insurance and pension plans may have on the economy. Fifty million Americans participate in retirement plans other than Social Security. The assets held in trust for these employees are vast and growing—more than $400 billion were reserved for retirement benefits at the end of 1977 and reserves are increasing by almost $50 billion a year. These plans, like other forms of insurance, depend on the accumulation of large sums to cover contingencies. The amounts set aside are determined by a painstaking assessment of the insurer's likely liability. Risks that the insurer forsees will be included in the calculation of liability, and the rates or contributions charged will reflect that calculation. The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and,

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reasons. *Id.* The House Small Business Committee recently surveyed the plans that notified the PBGC between June, 1976 and April, 1977 of an intent to terminate. Of those responding, 87.3 percent indicated that ERISA had some effect on the decision. *See* Pension Rep. (BNA) R-11 et seq. (Oct. 24, 1977).

[34] DOL Study at I-4. The assumptions of this study were based on an "element of conservatism." *Id.* at A-14. An actuarial study prepared by Martin E. Segal Co. for the NCCMP indicates that agregate damages may be nearer to $100 billion.

ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect." (Footnote omitted.)

The NCCMP fears that the adverse effects of the holding below will be especially significant for multiemployer plans. The plan termination and contingent employer liability provisions of ERISA presently allow employers contributing to multiemployer plans to withdraw from participation more easily than those contributing to single-employer plans. An employer's withdrawal from a single-employer plan normally results in plan termination, imposing substantial ERISA-related liability on the employer. In contrast, an employer's withdrawal from a multiemployer plan (by "bargaining out"—*i.e.*, not agreeing in the next collective bargaining agreement to continue contributions to the plan), will generally not cause a plan termination,[35] and the employer may well escape all liabil-

[35] In most cases, ERISA does not even require such withdrawal to be reported. When a "substantial employer" (an employer accounting for 10 percent or more of the plan's contributions over two consecutive years out of the three years preceding withdrawal (ERISA § 4001(a)(2)) withdraws from a plan, the plan administrator must notify the PBGC. ERISA § 4063(a)(1). (It is not yet clear whether the simultaneous or concerted withdrawal of two or more employers, accounting for 10 percent or more of the plan's contributions only in the aggregate, constitutes the "withdrawal of a substantial employer.") The withdrawing employer must post a bond or pay an amount into escrow as surety against contingent liability in a later plan termination, but if no termination occurs in the five years following withdrawal, the withdrawing employer has no ultimate liability. ERISA § 4063(c)(2). If the withdrawal causes a "reportable event" under ERISA § 4043(b), the administrator must report such event to the PBGC. ERISA § 4043(a).

ity under ERISA.[36] Indeed, the termination of a multiemployer plan will generally impose no ERISA liability on contributing employers where the benefits of multiemployer plan participants are not insured under Title IV of ERISA.[37]

The ease with which employers may withdraw from multiemployer plans is of particular significance in considering the impact of extending Rule 10b-5 rights of action, given the unique role of these plans and the difficulties which have beset their creation and maintenance. Economic conditions in those industries which have multiemployer plans were generally not favorable to their formation. While workers have managed to secure the creation of such plans through collective bargaining, those plans have had to be carefully nurtured.[38] The plans are still attempting to adjust to the complex regulatory environment created by ERISA.

[36] A termination in the five years following withdrawal will generally impose liability, but such liability will decrease to zero over this five-year period.

[37] PBGC Opinion No. 75-9 states: "Under Sec. 4082(c) of the Act, the Corporation generally does not pay benefits of multiemployer plan participants guaranteed under Title IV; and thus there is no employer liability with respect to multiemployer plans which terminate prior to January 1, 1978." (ERISA has since been amended so that the date when PBGC insurance becomes mandatory for multiemployer plans is now July 1, 1979.) ERISA allows the PBGC to provide insurance under certain conditions prior to the date when such insurance is mandatory. ERISA §§ 4082(c)(2), (3) and (4).

[38] A recent study by the PBGC found that "approximately one-eighth of all multiemployer plans, covering one-fifth of participants in such plans, are experiencing significant financial hardship which may result in plan termination." "Potential Multiemployer Plan Liabilities Under Title IV of ERISA," reproduced in Pens. Plan Guide (CCH) ¶ 23,036 (1977).

The added burden of compliance with the securities laws, never contemplated, may well be too much for their fragile underpinnings. Thus, extension of securities regulation to pension funds would threaten the very existence of multiemployer plans—the only vehicle that exists in many industries for providing pension and welfare benefits to workers and their dependents.

CONCLUSION

For the foregoing reasons, the NCCMP urges that the Court reverse the judgment of the court below.

Respectfully submitted,

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Dated: May 22, 1978

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

IN THE

Supreme Court of the United States

October Term, 1978
Nos. 77-753, 77-754

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS PEICK,

Petitioners,

vs.

JOHN DANIEL,

Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Motion for Leave to File Brief Amicus Curiae of the Gray Panthers in Support of the Respondent John Daniel.

MOTION OF GRAY PANTHERS FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Gray Panthers respectfully move this Court, pursuant to Supreme Court Rule 42(1), for leave to file the accompanying brief in this matter as amicus curiae in support of the Respondent John Daniel. In support of this motion, the Gray Panthers show as follows:

1. The parties in this action have refused to consent to the Gray Panthers filing an amicus curiae brief in support of Respondent John Daniel.

2. The Gray Panthers is a national organization whose membership is composed of both young and old persons throughout the United States who seek to reform and improve various institutions and laws that affect the lives of senior citizens. Among the major concerns of the Gray Panthers is assuring that older Americans receive all their entitled benefits from private pension plans.

3. The views of amicus Gray Panthers are particularly important because it is the only organization offering its views in this case which represents the interests of plan participants. Amicus is in fact a unique elderly organization because its members include persons currently employed in work covered by private pension plans, retired workers who have been denied pension benefits and retirees now receiving pensions. Numerous other organizations have sought to participate in this action as amici curiae in support of the Petitioners, however, all of these amici have a strong self-interest in the current structure of the pension industry. Amicus ERISA Industry Committee (ERIC) and National Association of Manufacturers (NAM) are composed of corporations who sponsor private pension plans and receive favorable financial and tax benefits for their plans. Amicus American Academy of Actuaries are some of the principal employees of the pension industry. Amicus AFL-CIO, although a labor organization, also has strong attachments to the pension industry because its leaders are the trustees of numerous private pension plans. Labor unions' interests are essentially those of management rather than that of rank and

file workers. Renfrew, "Fiduciary Responsibility Under the Pension Reform Act," 32 BUS. LAWYER 1829 (1977). The Gray Panthers feel it is critical for the views of plan participants—the consumers of the pension industry—to be heard by this Court.

4. Amicus Gray Panthers further believes that its views are supplemented and aided by the knowledge and experience of its counsel at the National Senior Citizens Law Center. Attorneys from the Law Center have had extensive involvement with the private pension system solely on behalf of pension consumers. National Senior Citizens Law Center has represented individual workers and classes of workers in attempts to gain benefits from dozens of major private pension plans governed by the Taft-Hartley Act and thus similar in structure to the plan negotiated by petitioner Local 705. In addition to litigation, Law Center attorneys were actively involved in the congressional deliberations surrounding the passage of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001, *et seq*. This experience has given amicus' attorneys a unique perspective on the impact of this decision on other federal labor statutes and policies.

5. Amicus Gray Panthers was, because of its members' unique position as pension consumers, allowed to participate as amicus curiae in support of Mr. Daniel in the proceedings below in the Court of Appeals. Further, the specific views of amicus Gray Panthers on federal labor policy and the integration of the securities laws, ERISA and the Taft-Hartley Act were adopted by the court below.

6. This Court also allowed amicus Gray Panthers to file a brief in opposition to the Petitions for Writs

of Certiorari. Amicus Gray Panthers has been informed by the Clerk's office of this Court that said filing did not necessarily permit amicus' filing of a brief on the merits. Amicus' previously filed brief concerned itself solely with the petitioners' arguments on the effect of the decision below on federal labor policy. The accompanying brief does not repeat those arguments which the Gray Panthers still feel are pertinent and important. Rather, amicus now seeks to address other related questions concerning the nature of the pension benefits which have been specifically discussed in the briefs of the parties and amici who support them.

Similarly, these additional arguments, not previously presented to the Court, will not repeat arguments to be made by the respondent but instead will offer the unique perspective of the amicus organization.

WHEREFORE, it is respectfully moved and requested that the Gray Panthers be granted leave to file the accompanying brief as amicus curiae.

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NATIONAL SENIOR CITIZENS LAW CENTER,
By BRUCE K. MILLER,
Attorneys for Amicus Curiae.

BRIEF AMICUS CURIAE OF THE GRAY PANTHERS.

Interest of the Amicus.

A statement describing the Gray Panthers and their interest in this case is set forth in the preceding motion requesting leave to file this amicus curiae brief.

Introduction and Summary of Argument.

The primary legal issue which must be resolved in this action is whether pension benefits are protectible interests within the umbrella of the federal securities laws. Since this is a difficult question of first impression, it has tended to cause the parties and supporting amici to undertake a sophisticated analysis of the nature of pension benefits and the various forms of investments. Lost in this maze is the ultimate objective sought by Mr. Daniel—disclosure of critical information concerning his pension benefits. Respondent simply asks for an opportunity to make rational plans—rather than uninformed judgments—about his retirement income needs.

This case, then, cannot be decided in a vacuum or merely on abstract principles and theories. Instead, it must be grounded in the "economic realities" of the everyday life of American workers and the importance they place on retirement benefits. Like Mr. Daniel, these workers rightfully expect to receive pensions at retirement and need important information in order to assure their security in old age.

The various briefs of the petitioners and the amici who support them, labor strenuously to evade the thrust of Mr. Daniel's very simple request. It is puzzling and more than a little disturbing that the petitioners

(Mr. Daniel's own pension plan and his own union), as well as most of the pension and business community, have gone to such lengths to deny that participants in pension plans should be told information concerning their plans' operations. Why is the pension industry afraid to tell Mr. Daniel how his pension plan is designed and how it operates? Why should Mr. Daniel be kept in the dark about the likelihood of his receiving benefits when he retires?

Amicus Gray Panthers strongly believes that persons who participate in pension plans, whose toil and dollars have created a huge financial empire, have a right to know the basic facts which underlie its operation. Amicus submits that only with the clear knowledge of necessary facts can American workers make rational choices to prepare for their retirement. Affirming the decision of the Court of Appeals below is only one step in assuring that workers are not caught by surprise at age 65.

Amicus' view of the importance of disclosing information leads it to totally disagree with the contentions of the petitioners herein. In the present brief, however, Amicus addresses itself to three of the petitioners' contentions, all of which relate to characterization of pensions and how the pension system operates:

1. The nature of pension benefits and of employees' interest in those benefits. Amicus will demonstrate that pension benefits, contrary to the petitioners' claims, are part of a worker's compensation and, under recent decisions of this Court, interests entitled to substantial legal protection.

2. The relationship of the disclosure requested under the securities laws to other federal pension laws.

Both petitioners have claimed that Congress' passage of additional pension legislation indicates a desire to remove pensions from the province of the Securities Exchange Commission. Amicus maintains, as it did in the Court of Appeals, that the nature and timing of the disclosure sought by Respondent was not intended to be within the purview of other pension laws; rather, the disclosure called for by the securities laws complements the requirements of other federal legislation.

3. The availability and usefulness of the information to be disclosed to plan participants. Amicus will show, in opposition to the arguments of the petitioners and amicus American Academy of Actuaries, that there is a large amount of relevant, material and understandable data concerning Mr. Daniel's eligibility for benefits which could be disclosed to him. Further, amicus maintains that such data is not misleading, but useful and important to pension participants.

ARGUMENT.

I.

Employees Such as Respondent John Daniel Have a Protectible Interest in Pension Benefits.

Petitioner International Brotherhood of Teamsters (hereinafter, "IBT") premises much of its analysis of the nature of pension benefits on the theory that pension participants do not have an enforceable "interest" in benefits. Instead, IBT contends such benefits are merely a "contingent expectancy", IBT Brief at p. 40, in which employees have no guaranteed interest. *See also* IBT Brief at pp. 33, 37, 41, 42, 52 and 61. While stopping short of reverting to the nineteenth century notion that pensions are gratuitous,[1] the IBT contends the Court of Appeals rested its analysis in large part on this misconception of pension benefits as deferred compensation.

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[1]The IBT does imply, however, that in the 1930's, when the securities laws were before Congress, pensions were certainly not viewed as compensation and "were generally regarded as gifts." IBT Brief at p. 61. While some people may have still held to the gratuity theory at that time, the idea of pensions as a portion of wages is not merely a product of post-World War II philosophy. Even early in this century commentators recognized that employees have an important stake in the receipt of pension benefits:

> In order to get a full understanding of old-age and service pensions, they should be considered a part of the real wages of a workman. There is a tendency to speak of these pensions as being *paid* by the company, or, in cases where the employee contributes a portion, as being *paid* partly by the employer and partly by the employee. In a certain sense, of course, this may be correct, but it leads to confusion. A pension system considered as part of the real wages of an employee is really paid by the employee, not perhaps in money, but in the foregoing of an increase in wages which he might obtain except for the establishment of a pension system.

Albert deRoode, "Pensions as Wages," THE AMERICAN ECONOMIC REVIEW, vol. 3 (June 1913), p. 287.

The Court of Appeals did base its decision on its view that pension benefits were a part of an employee's wages—albeit a unique form of such wages. Relying on its earlier landmark decision of *Inland Steel Co. v. National Labor Relations Board,* 170 F.2d 247 (7the Cir. 1948), *cert. den.* 336 U.S. 960 (1948), the appeals court held that pension benefits consisted of "putting money into a fund for an employee's future use which he would otherwise be getting in his paycheck." *Daniel v. International Brotherhood of Teamsters, etc., et al.,* 561 F.2d 1223, 1232 (7th Cir. 1977).

The Court of Appeals found that this form of compensation, even if termed a "contingent expectancy", created for employees a distinct and protectible interest in pension benefits. Therefore, Judge Cummings concluded that

> a right to receive benefits, received as a form of compensation and not subject to unilateral withdrawal by the pension trustee or the employer. is a sufficient interest to constitute a security, even though it will only mature upon the happening of certain events in the future.

Id., at 1233.

The Seventh Circuit's view of the employee's "protectible interest" in pension benefits is consistent with the recent views of the nature of pension benefits expressed by this Court. *See Alabama Power Co. v. Davis,* 431 U.S. 581, 98 S.Ct. 1185 (April 3, 1978); *City of Los Angeles Dept. of Water and Power v. Manhart,* ....U.S. ...., 98 S.Ct. 1370 (April 25, 1978), and *Allied Structural Steel Co. v. Spannaus,* .... U.S. ...., 46 U.S.L.W. 4887 (June 28, 1978).

All of these cases have required this Court to construe the nature of pension benefits in light of various statutes and constitutional provisions. In each case, the Court premised its holding on the principle that pension benefits are deferred compensation in which employees have a protectible interest and on which they "are entitled to rely. . . ." *Allied Structural Steel, supra,* at p. 4890. Like the Court of Appeals below, this Court has accepted the economic reality that pensions are a key element of an employee's wages and certainly, as Mr. Justice Stewart declared, an "*additional form of compensation*" (emphasis supplied). *Id.*

This Court's recent discussion of the nature of pension benefits is not limited to the context of the *Allied Structural Steel* case. In *L.A. Dept. of Water & Power v. Manhart, supra,* this Court was required to analyze pensions under the auspices of a separate enactment, the Equal Pay Act. This time Justice Stevens, speaking for the Court, held that "pension benefits and the contributions that maintain them are 'compensation' under Title VII [citations omitted]." 98 S.Ct. at 1377 n.22.[2]

Petitioner IBT, while not discussing the above cases, attempts instead to buttress its contrary contingency

[2]The Court, in reaching that conclusion, referred to an earlier decision from the Fifth Circuit, *Peters v. Missouri-Pacific R. R. Co.,* 483 F.2d 490, 492 n.3 (5th Cir. 1973), *cert. den.* 414 U.S. 490. In turn, the *Peters* court holding that retirement plans are within the scope of Title VII, relied on the Seventh Circuit's decision in *Bartness v. Drewrys USA, Inc.,* 444 F.2d 1186, 1188-1189 (7th Cir. 1971), *cert. den.* 404 U.S. 939. Not surprisingly, the Seventh Circuit's views of pension benefits as compensation covered by Title VII in *Bartness* are bottomed on the case of *Inland Steel Co. v. NLRB, supra.* Thus, the ruling in *Manhart* is not only consistent with but also directly supported by the same case (*Inland Steel*) that the Court of Appeals below relied on for its view of pensions as deferred compensation.

theory on this Court's earlier decision in *Alabama Power v. Davis, supra,* and in particular on the Court's suggestion that in some respects pensions are "predominantly rewards for continuous employment." 431 U.S. at 594. According to IBT, this statement evidences this Court's rejection of the theory that pensions are a form of compensation.[3]

IBT's reliance on *Alabama Power, supra,* is misplaced. To the contrary, Mr. Justice Marshall, writing for a unanimous court, found that pensions are, in fact, compensation within the meaning of a number of federal statutes, 431 U.S. at 592. Developing this view, Justice Marshall pointed out that "pension benefits have some resemblance to compensation for work", 431 U.S. at 592, and that "future benefits [pensions] may be traded off against current compensation", *id.* Not surprisingly, these observations prompted Justice Marshall explicitly to underscore the continuing validity of *Inland Steel, supra,* 431 U.S. at 592 n.16.

This endorsement of the deferred compensation account of pension benefits is especially significant in the context of the statute under consideration in *Alabama Power.* The issue before the court was whether pensions were an incidence of seniority under the Military Selective Services Act. Employees absent from work for military service would not be entitled to pension credits if retirement benefits were mere gratuities or contingent expectancies; rather, employees had to have some right to expect pension payments in

[3]The Court of Appeals below was certainly cognizant of the *Alabama Power* decision and discussed it at footnote 43, 561 F.2d at 1244-45. The Seventh Circuit used the occasion to reject the petitioner's arguments and to point out that *Alabama Power* also accepts the deferred compensation analysis of interests in a private pension plan. *Id.*

order for those payments to be incidents of seniority. Such payments, this Court held, were part of the direct rewards of work. Congress thus intended that employees who were unable to work because of military service would retain their right to receive them. Plainly, then, pensions were important, real and protectible interests, deriving from an employee's service to his employer.

Thus, *Alabama Power,* as well as *Manhart* and *Allied Structural Steel,* recognize that pensions are in reality a unique form of compensation. An employee's interest in that compensation is not only an important enough interest to be protected by the Military Selective Service Act and the Contract Clause of the Constitution, but is also "a sufficient interest to constitute a security." *Daniel v. International Brotherhood of Teamsters, etc., supra,* at 1233.

II.

A Holding That Mr. Daniel Has Stated a Claim Under the Securities Laws Is Consistent With the Intent of Congress.

Petitioners IBT and Local 705 contend (IBT Brief, pp. 67-135; and Local 705 Brief at pp. 27-44) that the decision of the Court of Appeals in this case is directly contrary to the prior intent of Congress. They maintain that this intent is not demonstrated by the legislative history of the securities laws, but instead devolves from the later congressional enactment of the Welfare and Pension Plans Disclosure Act (hereinafter WPPDA), 29 U.S.C. §301, *et seq.*, and the Employee

Retirement Income Security Act (hereinafter ERISA), 29 U.S.C. §1001, *et seq.*[4]

Relying on statutes passed 25 and 40 years after the securities laws to determine congressional intent in 1933 or 1934 is certainly stretching the analysis beyond its limits. Petitioners' contentions merely reemphasize that this issue—whether pensions are securities under the federal securities laws—is one of first impression.

Further, petitioners do not point to any legislative statements, even during the discussion of the WPPDA and ERISA, that directly speak to the question raised by respondent John Daniel. Instead, they contend that because the issue was not directly addressed,[5] and

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[4]Local 705 also looks to the legislative history of Section 302(c)(5) of the Labor Management Relations Act of 1947, 29 U.S.C. §186(c)(5). (Local 705 Brief at pp. 27-29.) There is no doubt that this additional statute was intended to place structural controls on some union negotiated pension plans, but Local 705 cannot seriously claim that §302(c)(5) was designed as a disclosure statute.

[5]Petitioners do allege that Congress did consider at least tangentially the relevance of pensions to securities laws when it considered whether the S.E.C. should administer the WPPDA. See, for example, IBT Brief, at pp. 71-72. That discussion illustrates nothing about the nature of pension benefits or whether such benefits are securities. If anything, it supports Daniel rather than IBT because it does illustrate that when Congress considered who should administer the law it assumed that the S.E.C. was a perfectly reasonable choice. The S.E.C. was considered presumably because many members of Congress assumed pensions were within the province of the S.E.C. See the comments of Sen. MacNamara quoted at p. 32 of the Local 705 Brief.

The S.E.C. was rejected in favor of the Department of Labor, not because of a conclusion about pensions *per se* but because Congress concluded that the Labor Department was a better administrative body to operate the kind of disclosure

(This footnote is continued on next page)

because Congress did enact separate pension legislation, it must have concluded pensions were not subject to securities law provisions.

Silence by Congress on the question does not support petitioners' contentions. Amicus, as do all parties, recognize that the issues of this case were not directly and comprehensively addressed prior to this lawsuit. However, merely because the issue is raised at a late date does not deprive it of its validity.

But even if petitioners' syllogism is conceded, their assumptions as to Congress' purposes in enacting the foregoing pension statutes are not valid. The purpose of Congress in adopting WPPDA was not to provide pension beneficiaries with information which is similar to that demanded under the securities laws. Rather, Congress had a different, complementary agenda.

In *Malone v. White Motor Corp.*, ... U.S. ...., 98 S.Ct. 1185 (1978), this Court had an opportunity to review the legislative history of the WPPDA. After thorouly discussing the congressional intent and reviewing the legislative history, the Court concluded that the intent of the act was to provide information to (1) evaluate the administrative efficiency of a pension plan and (2) to assure that the plan's assets were sufficient to pay the promised benefits. .... U.S. ...., 98 S.Ct. at 1191-

required under the new law because pensions were part of the collective bargaining process (WPPDA). Thus, Congress recognized the dual but complementary interest of two government agencies in disclosure of information. *See* Legislative History of the Welfare and Pension Plan Disclosure Act of 1958, as amended by Pub.L. 87-420 of 1962, at 77; *cf. Malone v. White Motor Corp.*, ... U.S. ...., 98 S.Ct. 1185 (1978).

93. Not surprisingly, the primary purpose of this information was to assure recipients (and the federal government) a means to check corruption within the pension industry. *Id.*

These purposes are a far cry from the securities disclosure sought by Mr. Daniel. WPPDA was only intended to provide Mr. Daniel with assurance that the pension fund was not wasting his money or spending it improperly. It was not designed to disclose either the operation of the eligibility structure of the plan or the likelihood of a worker's receiving benefits at retirement. The nature of the disclosures in these two laws were entirely different, although certainly not contradictory. Congress could not have assumed when requiring the anti-corruption disclosure of WPPDA that it was substituting or replacing other information required under the securities laws.

Similarly, ERISA's enactment in 1974 does not reflect congressional intent on the scope of the securities laws. While the nature of the information disclosed to beneficiaries pursuant to ERISA is more expansive than that under the WPPDA, it is not directed at the same problems as the securities laws.

The material which must be disclosed under Mr. Daniel's claim is information which is necessary to evaluate the wisdom of an investment into a pension plan. In essence, respondent seeks the actuarial assumptions upon which the plan is designed. This information would allow an employee to determine whether it was worthwhile to invest his wages in a pension plan or

evaluate the likelihood of his receiving a return on his investment.

ERISA disclosure, on the other hand, attempts first to accomplish the same purposes as the WPPDA; thus, Congress repealed WPPDA when it passed ERISA, 29 U.S.C. §1031(a).[6] Secondly, ERISA provides, once the participation (or investment) into the plan is accomplished, information on what additional work must be done to generate benefits and what is an individual's current benefit status. ERISA does not require information on what goals and expectations underlie the pension plan; rather, it is a practical update of the current value of one's investment and what additional contributions are necessary to secure an adequate return through retirement benefits. Thus, the securities disclosure is "complementary to the requirements of ERISA", which is probably what Congress intended, as it makes "good sense". *Daniel, supra.*

To a large extent, petitioner IBT acknowledges (see pp. 83-84 of the IBT Brief), the important differences between the respective disclosure schemes called for by ERISA and by the securities laws. Instead, the IBT argues that the Court's error was in "holding that it makes 'good sense'" to construe the two statutes in complementary fashion. IBT Brief at p. 84. Petitioner suggests that the Court has substituted its judgment for that of Congress.

[6]The Court of Appeals below also pointed out that Congress placed in ERISA a savings clause, 29 U.S.C. §1144(d), which "provides that ERISA shall not be construed to supersede any federal law or rule thereunder." *Daniel v. International Brotherhood of Teamsters, etc.*, 561 F.2d at 1246. Consequently, contrary to the implications suggested by the petitioners, Congress seems to have made some explicit decisions in ERISA to void some disclosure laws (WPPDA—because ERISA provided similar remedies), and retain others (Securities—because ERISA did not duplicate or replace them).

On the contrary, as amicus has shown, a reasonable account of Congress' activity in the pension field shows an intent to produce a complementary relationship with the securities laws. Petitioner's conclusions result from the false premise that separate federal pension legislation must mean that Congress found pensions to be exempt from the anti-fraud provisions of the securities laws. However, as shown above, such an assumption cannot be made and, affirming the Court of Appeals' interpretation of the securities laws is consistent with the intent of Congress and with "good sense." *Daniel*, 561 F.2d at 1248, *supra*.

III.

The Actuarial Information Sought by Respondent Daniel Is Available and Useful to Pension Participants.

Both petitioners in conjunction with amicus American Academy of Actuaries (hereafter Actuaries) have tried to persuade this Court that the Court of Appeals rested its decision at least in part on false assumption about the nature and availability of actuarial assumptions. Petitioners attack both lower courts' reliance on statistics concerning the likelihood of employees receiving benefits at retirement developed by Congress during its pre-ERISA studies.[7] Their briefs contend first that actuarial information of that sort is not readily available to pension plans and second, that even what is available should not be disclosed because it is misleading.

The arguments on these points are the prime examples of the petitioners' and their supporters' extreme attempts to hide information at their disposal from plan partici-

[7]See Interim Report of Activities of Private Welfare and Pension Plan Study, S.Rep. No. 92-634, 92nd Cong., 2d Sess. (1972) cited at 410 F.Supp. 551 and 561 F.2d at 1227.

pants. More important, such contentions are merely smoke-screens to divert this Court from the limited issues raised by the procedural posture of the present action.

The only question before this Court is whether respondent Mr. Daniel has stated a claim under the anti-fraud provisions of the securities laws. Whether he has in fact proved a violation of those laws remains to be seen—as neither the district court nor the Court of Appeals has had an opportunity to consider those issues.

Consequently, neither the content of the information to be disclosed, nor whether such information was in fact material, or possessed by the defendants below was before the lower courts at this stage. Petitioners, by seeking interlocutory review in this matter, have chosen to present this case to appellate courts before all relevant factual information was developed. They cannot now be permitted to exploit the bare record produced by this choice to defeat Mr. Daniel's claim. Amicus recommends that this Court not mire itself in the difficult analysis of the scope of disclosures that are demanded by the securities laws, but once having decided that Mr. Daniel has alleged a valid securities claim this Court should remand the case to the district court to address those issues.[8]

[8]Local 705's incredible attempt to introduce new evidence in the form of an actuarial report in its brief to this Court illustrates amicus' position. See Local 705 Brief, pp. A1-A39. The fact is that Local 705 realized that the record below did not contain a factual basis for their arguments on the nature and effects of disclosure. They are presenting to this Court evidence admittedly not introduced before and to be considered *for the first time* in the Supreme Court. Even if this evidence is relevant, then it should, as amicus suggests, be considered first by the district court so that an adequate record can be developed.

Since petitioners and amicus Actuaries have raised these subjects, amicus Gray Panthers feels compelled to briefly point out the inaccuracies, invalidity and limitation of their arguments. The first contention which must be addressed is the claim that the information required to be disclosed "is not the type of information which a plan actuary uses." Local 705 Brief, at p. A4. In essence, the Actuaries and petitioners have suggested that the kind of material information which the Court of Appeals wanted Mr. Daniel to have was not in reality available to the pension trustees.

Amicus Gray Panthers cannot agree with this assertion. Actuaries and pension plan designers certainly do intend that the pension plan will have a specific impact on participants. Since the system thrives on participant forfeitures, without knowing at some level how many forfeitures are involved, neither the actuary nor the trustees can determine the financial soundness of the fund.

Dan M. McGill, a noted expert on plan design in his important treatise, *Fundamentals of Private Pensions,*[9] states emphatically that

> . . . the first step in the valuation of a retirement benefit is the determination of the *probability that the participant in whose behalf the benefit has been credited will survive in service to early or normal retirement age.* McGill, *Fundamentals of Private Pensions,* at 312. (Emphasis supplied).

McGill then goes on to describe what he terms "decrements," which are the forces that determine the proba-

[9]Mr. McGill's book is generally accepted as one of the most important and influential books in the field. It has been cited with approval by petitioner IBT, amicus Actuaries, and the Court of Appeals below.

bility that an employee will in fact receive benefits. These primary decrements—death, disability, and termination for other reasons—are, according to McGill, predictable and should always be computed by actuaries.

Ironically, the actuarial affidavit attached to Local 705's Briefs demonstrates this point. In the appendix to that affidavit which illustrates the methodology used by Local 705's actuaries, they detail, as McGill suggests, their use of the termination rates and the "decrements" in order to determine how many persons will receive benefits. This information on the likelihood of receiving benefits translated to layman's terms is in fact the kind of material that the Court of Appeals considered should be disclosed.[10]

Petitioners and the actuaries do, in reality, concede that the information could be produced, but in turn deny its usefulness to Mr. Daniel, In sum, relying on the "Laws of Probabilities", they maintain that the nature of the facts requested will not aid employees but will mislead them.

It appears that petitioners are fearful that the information will be as dismal as the eight per cent rate of recovery noted in the congressional study and that the District Court was correct in suggesting that if employees knew that information they would not participate in a pension plan. 410 F.Supp. at 553. These

[10]Amicus does not contend that this kind of actuarial data is the only information which should be disclosed. Other material facts are in fact easier and simpler to obtain. For example, Mr. Daniel should have had available to him a simple statement which would reflect the direct impact of the break-in-service rule (the real villain in this case). Such a statement, indicating that no benefits were payable if an employee failed to work continuously for contributing employers in the next 20 years, would certainly have aided Mr. Daniel in evaluating the likelihood that he would receive a return on his investment.

contentions are, however, premised on a belief that the average American worker is so limited in general intelligence that he cannot recognize the inherent limitations of any mathematical projections. It is obvious that the applicability of general prognosis to any individual has its limitations, but that does not make such information useless or even misleading.

If an employee knows that the structure and eligibility conditions of a pension plan were designed so that only eight per cent of those whose compensation went into the fund would ever get a return, then that employee is perfectly able to weigh, based on his individual situation, whether he will be one of the eight per cent. He will be able to weigh the "risk" of the likelihood of a return on his investment. Certainly knowledge of these probabilities would have allowed Mr. Daniel to make a more rational and intelligent judgment about his retirement income. Such information would have, at a minimum, been more reliable than merely stating that benefits are recoverable after 20 years of work.

Conclusion.

Amicus Gray Panthers submit, as they have throughout this case, that the critical information required to be disclosed under the anti-fraud provisions of the securities laws must be made available to employees participating in pension plans. Pensions are, in economic reality, within the scope of the securities laws as they are protectible interests in the form of differential compensation. Further, contrary to the petitioners' contentions, Congress did not intend that disclosure about this unique form of security was subsumed by other pension legislation.

Finally, amicus reiterates that the information requested by Mr. Daniel is available and important to him. The disclosure requested is not misleading but is useful and relevant to an investment decision. Therefore, amicus Gray Panthers urges this Court to affirm the decision of the Court of Appeals below.

Respectfully submitted,

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